

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 10, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1264**

**Cir. Ct. No. 2012CV738**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**H. MICHAEL GOULD,**

**PLAINTIFF-APPELLANT,**

**V.**

**RUSSELL MITCHELL,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
MICHAEL MORAN, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. H. Michael Gould appeals a summary judgment dismissing his tort action. Gould argues the circuit court erroneously determined the fraudulent inducement exception to the economic loss doctrine was inapplicable. We agree with the circuit court that the exception does not apply

because the misrepresentations were interwoven with the contract. Accordingly, we affirm.

## **BACKGROUND**

¶2 In August 2004, Gould entered into an investment agreement with Mitchell Health Technologies, Inc. (MHT) for developing and marketing over-the-counter health care products. The negotiations and terms of the agreement were set forth in a series of letters between Gould and MHT's president, Russell Mitchell. On August 4, Gould wrote Mitchell:

I received your letter of Aug 2 on funding for new product by your firm. I thought you were further along in the process.

The risk is high and \$20,000 at this time is more than I'm willing to risk.

Questions 1. How long for patent process 2. Where would money go 3. Would I get copies of correspondence 4. Loan would have to be secured on demand with interest 5. What would minimum be at this time 6. How would I participate on success of patent being issued by helping at this time. ...

P.S. This would be a loan to Mitchell Health Tech is my understanding.

(Formatting altered.)

¶3 On August 6, Mitchell responded:

The preparation of the patent should take 3-6 months for submittal. It could take up to two years for approval.

The money would go primarily to pay attorney fees and develop prototypes.

We would be able to provide you with copies [of] relevant correspondence.

The loan can be secured.

The bare minimum needed is \$13,000.

We can certainly discuss additional opportunities for participation as we progress.

The check can be made out to Mitchell Health Technologies.

(Formatting altered.) Gould wrote MHT a \$13,000.00 check on August 12.

¶4 On August 23, Mitchell wrote Gould:

Thank you for your initial investment of \$13,000 and for your interest in investing further in our project. MHT has been in operation for 10 years now and we have a strong record in introducing new OTC products into the U.S. market. As we had discussed, MHT has several new products at various stages of completion and we are actively seeking seed capital to move forward. The markets for several of the categories we plan to address exceed \$1 billion annually.

I can appreciate your concern regarding the security of your investment and I would like to restructure our arrangement as we had discussed.

Your investment would be secured by acquiring a 1% ownership stake in MHT for each \$10,000 invested. MHT can repurchase that ownership within 2 years of inception by repaying the amount you have invested along with 25% annual interest. Michael Gould can also demand repayment with the same terms and simply give up any ownership rights that were acquired. This repayment can be repaid with either cash or other securities.

(Formatting altered.) Gould invested an additional \$14,000 between November 2004 and January 2005.

¶5 MHT was administratively dissolved by the Wisconsin Department of Financial Institutions in November 2010. Gould received neither an ownership stake in MHT nor repayment of the loan. MHT did not use Gould's payments to develop or market over-the-counter healthcare products. Rather, that was done by

a different company organized and principally owned by Mitchell. Gould's money was used to pay MHT's existing debts. MHT was not actively operating at the time Mitchell solicited Gould's initial investment.

¶6 Gould sued Mitchell in tort, alleging fraud. Mitchell moved for summary judgment, arguing, *inter alia*, the action was barred by the economic loss doctrine. The court held the fraudulent inducement exception to the doctrine was inapplicable because the fraud was interwoven with the contract. Accordingly, it granted Mitchell's motion and dismissed the action. Gould now appeals.

## DISCUSSION

¶7 Gould argues the circuit court erroneously granted summary judgment dismissing his action. Summary judgment is appropriate where there are no material issues of disputed fact and a party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).<sup>1</sup> We review a summary judgment determination de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

¶8 The issue before us is narrow. Mitchell concedes he made intentional misrepresentations to Gould, and Gould concedes the economic loss doctrine applies unless his claim falls within the fraudulent inducement exception. Whether the fraudulent inducement exception applies is a question of law subject to de novo review. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶¶15, 44-45, 283 Wis. 2d 555, 699 N.W.2d 205.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 The economic loss doctrine is a judicially created rule that “preclud[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.” *Id.*, ¶27 (citation omitted). The rule is intended to preserve the distinction between contract and tort by requiring transacting parties to pursue only their contractual remedies when asserting an economic loss claim. *Id.*, ¶28. Further, it “encourage[s] the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.” *Id.* (second brackets in *Kaloti*) (citations omitted).

¶10 However, a narrow exception to the rule precluding tort claims exists where a party was fraudulently induced to enter the contract. *Id.*, ¶42. To invoke the exception, a plaintiff must demonstrate: there was an intentional misrepresentation; the misrepresentation occurred before the contract was formed; and the fraud was extraneous to, rather than interwoven with, the contract. *Id.* (citing *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶47, 262 Wis. 2d 32, 662 N.W.2d 652).

¶11 “[E]xtraneous fraud concerns those matters whose risk and responsibility were not expressly or impliedly dealt with in the contract.” *Digicorp*, 262 Wis. 2d 32, ¶47. “[S]tated another way, [extraneous] fraud concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involve[] performance of the contract.” *Kaloti*, 283 Wis. 2d 555, ¶42. “[M]isrepresentations [that] relate to the breaching party’s performance of the contract’ are interwoven with the contract and ‘do not give rise to an independent cause of action in tort.” *Id.*, ¶43 (brackets in *Kaloti*) (citation omitted). “[T]he relevant inquiry is ‘the relationship between the inducing representation and the

essential requirements, expressed or implied, of the contract agreed to by the parties.” *Id.*, ¶42 (citations and quotation marks omitted).

¶12 Gould argues Mitchell’s misrepresentations were all extraneous to the contract because they did not concern MHT’s performance of the contract. According to Gould, MHT’s performance of the contract consisted only of “how it produced, and marketed, over-the-counter health products.” We disagree.

¶13 We first observe that the misrepresentations in this case fall into two categories: those preceding Gould’s initial \$13,000 investment, and those between the initial investment and his subsequent \$14,000 investment. Any representations Mitchell made after the initial investment obviously could not have induced Gould to enter into the initial agreement. The only misrepresentations preceding the initial investment were that “[t]he money would go primarily to pay attorney fees and develop prototypes” and that Mitchell “would be able to provide you with copies [of] relevant correspondence.” In discovery responses, Mitchell averred he used all of Gould’s money to pay debt, and he could not specifically account for any of the money.

¶14 In the letter setting forth the parties’ “restructure[d]” agreement, Mitchell additionally misrepresented that MHT had been in business for ten years and had several new products at various stages of completion. As noted above, MHT was inactive and not developing any products. Gould’s final \$14,000 in purchases followed these misrepresentations.

¶15 While we observe for the sake of precision that there are two sets of inducements and concomitant investments, ultimately, we address them together. The representations all related to either the quality of the product or performance of the contract.

¶16 Gould was investing in a small development-stage company, one in which he acknowledged the risk was high. The “product” he was purchasing was a share of that company and its product development services. The representations that Gould’s money would be used to develop and obtain patents for new products, including attorney fees, and that MHT was actively developing products were clearly material to Gould’s perception of the potential risks and rewards of his investment in the product company. In other words, they concern the quality of the investment product. Indeed, the representations go to the heart of what Gould believed he was purchasing.

¶17 Additionally, MHT’s performance of the contract was not limited solely to *how* it produced and marketed products. In fact, the parties’ letter contracts do not so much as mention the issue of *how* MHT would develop, produce, or market its products. Clearly, *whether* MHT engaged in production or marketing of any products, or spent Gould’s money doing so, is central to the performance inquiry. MHT failed to do anything it was supposed to do pursuant to the contract. Moreover, Gould essentially concedes the issue in his reply brief, asserting “it is undisputed that [MHT] didn’t perform according to Mitchell’s representations to Gould.”

¶18 Because all of Mitchell’s misrepresentations were either related to the quality of the product purchased or to performance of the contract, they were interwoven with the contract. *See Kaloti*, 283 Wis. 2d 555, ¶42. Consequently, the narrow fraudulent inducement exception to the economic loss doctrine is inapplicable. *See id.*

¶19 Finally, we observe that, consistent with the purpose of the economic loss doctrine, Gould could, and did, allocate the risk of a defective

product via the terms of the investment contract(s). *See id.*, ¶28. At any time in the first two years following his investments, Gould could have unilaterally elected to terminate his relationship with MHT and demand full repayment, plus a substantial twenty-five percent annual interest.<sup>2</sup>

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>2</sup> In his reply brief, Gould responds to Mitchell’s contract-performance argument by asserting Mitchell—as opposed to MHT—was not a party to the contract(s), and emphasizing he was complaining of Mitchell’s misrepresentations, not Mitchell’s performance of the contract. Even assuming, *arguendo*, Mitchell was not a contracting party, Gould does not develop any independent argument on this basis. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address undeveloped arguments). Regardless, we observe that corporations can only act through individuals, and Mitchell was MHT’s president.



